

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: DAVID AND CATHERINE DELUCA
BERTHING PERMIT #4948

AAD NO. 07-002/CRA

DECISION AND ORDER

This matter was reached for administrative hearing on August 8, 2007 before the Administrative Adjudication Division for Environmental Matters. Catherine DeLuca and David DeLuca ("Respondents") appealed the letter of termination issued on December 6, 2006 by the Division of Coastal Resources ("Division"), Department of Environmental Management ("DEM"), citing them with failure to meet the eligibility requirements for charter boats contained in Part II, Section 9 of the Galilee Port Operations Regulations and Berthing Management System ("Regulations") and terminating Berthing Permit # 4948.

The hearing was conducted pursuant to the Administrative Procedures Act, R.I. GEN. LAWS § 42-35-1 *et. seq.*, R.I. GEN. LAWS § 42-17.7-1 *et. seq.*, and the Administrative Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters. In this enforcement action, the Division bears the burden of proving the allegations by a preponderance of the evidence. The Division was represented by Gary Powers, Esq. and the Respondents appeared *pro se*. A prehearing conference was conducted immediately before the hearing. The following documents were submitted and marked as indicated.

For the Division of Coastal Resources:

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| Page | Div. 1 (Full) The Notice from the Division dated December 6, 2006 terminating subject berthing privileges. 2 Pages (Copy) |
| Page | Div. 2 (Full) The Respondents' Letter dated May 7, 2007 requesting a hearing concerning the Division's letter dated December 6, 2006. 1 (Copy) |
| of | Div. 3 (ID) The form letter sent by the Division on June 9, 2006 to all charter boat owners with vessels berthed at the State Pier at the Port Galilee requesting documentation concerning their |

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compliance
Operations and
System." 1 Page (Copy)

with Part II Section 9 of the "Galilee Port
Regulations and Berthing Management

For Respondents:

- Resp. 1 (ID)** Copy of Certificate of Organization for "Soak Up the Sun Boat Charter" dated June, 2004
- Resp. 2 (Full)** Copies of receipts from charters
- Resp. 3 (Full)** Copy of US Merchant Marine Officer License issued to David A. DeLuca dated August 4, 2003
- Resp. 4 (ID)** Brochure for "Sudden Impulse" Charter
- Resp. 5a (ID)** Copy of 2004 Partnership Tax Return
5b (ID) Copy of 2005 Partnership Tax Return
5c (ID) Copy of 2006 Partnership Tax Return
- Resp. 6 (ID)** Copy of IRS Employee Identification Number for "Soak Up the Sun" Boat Charter
- Resp. 7 (ID)** Copy of South County Hospital Emergency Room Report for David DeLuca dated 7/10/05
- Resp. 8 (ID)** Receipt for Mechanical Survey by Brewer Sakonnet Marina for David DeLuca dated 6/01/06
- Resp. 9 (ID)** Copy of Correspondence to the Administrative Adjudication Division dated 12/30/06
- Resp. 10 (ID)** Copy of Correspondence from Catherine and David DeLuca to Gary Powers dated May 3, 2007

The parties agreed upon the following stipulations of fact:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Respondents.
2. The Respondents received a Notice from the Division dated December 6, 2006 from the Division notifying Respondents that berthing privileges at the Port of Galilee State Piers were terminated.

There were two issues for determination at the hearing.

1. Should the Division's Motion to Dismiss be granted because Respondents failed to file a timely request for hearing thereby depriving AAD of jurisdiction to entertain the appeal?

2. Did the Respondents violate the Galilee Port Regulations and Berthing Management System by failing to comply with Part II, Section 9 of the Regulations relating to charter boats and if so, was termination of the berthing permit warranted?

At the conclusion of the hearing the parties were afforded the option of making a closing argument or filing written argument. Each side opted to make their closing statement in writing. The Division filed its memorandum with AAD on August 27, 2007 and Respondents filed their written statement with AAD on August 29, 2007. The hearing was deemed closed upon receipt of Respondents' statement.

Motion to Dismiss

On July 30, 2007, the Division of Coastal Resources filed "Division's Motion to Dismiss Applicant's Request for Hearing, or in the Alternative, Motion for Entry of Default". A timely objection was filed by Respondents¹ on August 6, 2007. As the matter was scheduled for hearing on August 8, 2007, oral argument on the Motion was heard at the commencement of the administrative hearing.

The Division argues that the request for hearing was clearly untimely and as such, the AAD has no jurisdiction to consider the appeal. As support for this position, the Division cites

R.I. GEN. LAWS §42-17.7-9 which establishes the time in which appeals must be filed with the AAD. It is undisputed that Respondents received the Notice of Termination of Berthing Privileges ("Notice") on December 6, 2006. Respondents' request for hearing was filed with AAD on May 7, 2007. The Division referenced the Notice (Division's Exhibit 1) which explicitly states that the request for hearing must be submitted in writing and received by the AAD within thirty (30) days of receipt of the Notice.

Respondents concede that they did not file a request for hearing with the AAD until

¹ Catherine and David DeLuca are properly referred to as Respondents in this matter. AAD erroneously docketed the matter as an Application matter and the parties agreed at the prehearing conference and on the record at the hearing that any reference to Applicant(s) was to be deemed a reference to the Respondents in this proceeding.

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May 7, 2007. Respondents state that they presented a request for hearing at the office located at the Port of Galilee as this was the office that they were familiar with and had had dealings with in the past. Respondents admitted during argument that it was their mistake but that they thought they were in compliance with the filing requirements when they presented the request for hearing at the Galilee office.

Analysis

R.I. GEN. LAWS §42-17.7-9 states as follows:

§ 42-17.7-9 Uniform appeal period established. – Regardless of any other provision of the general laws to the contrary, all requests for an adjudicatory hearing within the department of environmental management must be in writing and must be filed with the clerk of the administrative adjudication division for environmental matters within twenty (20) calendar days of receipt of the contested agency action for all enforcement actions. All license and permit appeals must be filed with the clerk of the administrative adjudication division for environmental matters within thirty (30) calendar days of receipt of the contested agency action. Every notice of contested agency action shall provide notice of the twenty (20) day or thirty (30) day appeal period and of the procedures for filing an appeal. The time and manner of filing established in this chapter are mandatory and jurisdictional.

There is no dispute that the filing with AAD was out of time. The only issue for determination is the strictness with which the appeal provisions of R.I. GEN. LAWS §42-17.7-9 must be applied.

“It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Keystone Elevator Co. v. Johnson & Wales University*, 850 A.2d 912, 918 (R.I.2004) (quoting *State v. DiCicco*, 707 A.2d 251, 253 (R.I.1998)). “Moreover, when we examine an unambiguous statute, ‘there is no room for statutory construction and we must apply the statute as written.’ ” *Id.*

The Rhode Island Supreme Court reviewed a comparable statute concerning the jurisdiction of the Superior Court to hear probate appeals. See *Griggs v. Estate of Griggs*, 845 A.2d 1006 (R.I.2004) (per curiam). In that case, General Laws 1956 § 33-23-1(a)(2) required

an aggrieved party, in addition to filing an appeal within twenty days after execution of the Probate Court order, to file a certified copy of the record within thirty days after entry of the order. The Court noted that § 33-23-1(e) specifically stated that the “deadline of subsections (a)(1) and (a)(2) of this chapter are jurisdictional and may not be extended by either the probate court or the superior court * * *.” Based on the clear language of that statute, the Court held that the time requirements set forth in the statute “are jurisdictional and may not be extended ‘by a sympathetic trial justice.’” Griggs, 845 A.2d at 1009 (quoting In re Estate of Speight, 739 A.2d 229, 231 (R.I.1999) (per curiam)).

General Laws 1956 § 33-23-1(a)(2) and §42-17.7-9 are parallel. R.I. GEN. LAWS §42-17.7-9 requires that all requests for an adjudicatory hearing *must* be in writing and *must be filed with the clerk of the administrative adjudication division for environmental matters* within the prescribed time period (emphasis added). Moreover, the statute directs that “[T]he time and manner of filing established in this chapter are mandatory and jurisdictional”. R.I. GEN. LAWS §42-17.7-9. Strict compliance with R.I. GEN. LAWS §42-17.7-9 is a prerequisite to AAD acquiring jurisdiction to entertain the appeal.

Respondents’ claim of filing with an office other than AAD is unavailing. In Mauricio v. Zoning Board of Review of Pawtucket, 590 A.2d 879 (R.I.1991) our Supreme Court considered a zoning statute which required that persons seeking to appeal a decision of the zoning board file a complaint in the Superior Court for the county in which the municipality is situated within twenty days after the decision of the zoning board has been filed. An appeal was placed in the mail but not received or filed in the Superior Court until after the expiration of the twenty day appeal period. The Court held that that statute was plain and unambiguous, leaving no room for interpretation. The Court held that the statute “...does not give any room for interpretation. It must be complied with in accordance with its terms. These terms require a filing within twenty days, not a mailing or a notice to opposing counsel. This filing was clearly not accomplished within the time limit.” Mauricio v. Zoning Board of

Review of Pawtucket, at 880. Ultimately, the Court opined

“As the filing of a notice of appeal is a sine qua non in order to invoke the jurisdiction of the Supreme Court for appellate purposes, the filing of a notice of appeal with the clerk of the Superior Court for the appropriate county is an essential condition precedent to the invoking of the jurisdiction of the Superior Court to review a decision of a zoning board. In both instances the necessary act is the filing, not the mailing or sending notice to an adversary. Only the filing sustains the validity of the appeal if made within the required period. Any risk of nondelivery must be borne by the party who seeks the appeal. If the condition is not met, the appeal is invalid and the Superior Court has no choice save to dismiss as was done in this case.” *Id.*

The facts of this case establish that Respondents received the Notice on December 6, 2006. The Notice indicated that appeals must be submitted and received by the AAD within thirty (30) days. Respondents presented a request for hearing at a DEM office in Galilee in December of 2006, but filed no request for hearing with the AAD until May 7, 2007. Based on the facts of the instant matter, the clear mandate of R.I. GEN. LAWS §42-17.7-9 and controlling case law, AAD is without jurisdiction to entertain Respondents' appeal and the Motion to Dismiss must be granted.

As the Motion to Dismiss is dispositive, it is unnecessary to reach the merits of the appeal. However, assuming *arguendo* that AAD has jurisdiction to decide this appeal, the evidence is undisputed that neither Respondents nor Soak Up the Sun Boat Charter holds a state charter boat license. Additionally, because Respondents have endured health and business setbacks in the last year, they conceded at hearing that they did not meet the performance standards for charter boats required by the Regulations. In fact, they presented evidence of only two days (three charters total) from May 30, 2006 through October 30, 2006 when the boat carried passengers for hire. The Respondents had the opportunity as late as the morning of the hearing to rebut the evidence presented by the Division but were unable to do so. The Respondents are not in compliance with Part II, Section 9 of the Galilee Port Operations Regulations and Berthing Management System and termination of the berthing permit was warranted.

FINDINGS OF FACT

Based on the documentary and testimonial evidence of record, I find as fact the following:

1. The Respondents received a Notice from the Division dated December 6, 2006 notifying Respondents that berthing privileges at the Port of Galilee State Piers were terminated.
2. The Notice states that the request for hearing must be submitted in writing and received by the AAD within thirty (30) days of receipt of the Notice. The proper address for AAD was provided in the Notice.
3. Respondents' request for hearing was filed with AAD on May 7, 2007.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

1. The Respondents failed to request an adjudicatory hearing in the time and manner required by R.I. GEN. LAWS § 42-17.7-9.
2. The requirements of R.I. GEN. LAWS § 42-17.7-9 are mandatory and jurisdictional.
3. The Administrative Adjudication Division lacks jurisdiction to entertain Respondents' appeal.

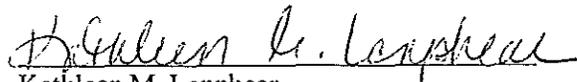
Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. The Division's Motion to Dismiss is GRANTED.
2. Respondent's appeal, AAD No. 07-002/CRA is DISMISSED.

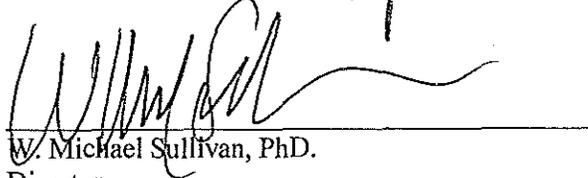
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Entered as a Recommended Decision and Order this 11th day of September, 2007
and herewith forwarded to the Director for issuance as a Final Agency Order.



Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Order this 11th day of September, 2007



W. Michael Sullivan, PhD.
Director
Rhode Island Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908
(401) 222-2771

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Catherine and David DeLuca, 17 Avenue D, Narragansett, RI 02882; and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 12th day of September, 2007.

